ORAL ARGUMENT NOT YET SCHEDULED

NO. 20-72432 (L), 20-72452, 20-72782, 20-72800, 20-72958, 20-72973

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

NEVADA IRRIGATION DISTRICT, et al.,

Respondent-Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF AMICI CURIAE OF THE STATES OF WASHINGTON, CONNECTICUT, MAINE, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, VERMONT, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTHS OF MASSACHUSETTS AND VIRGINIA IN SUPPORT OF PETITIONER, CALIFORNIA STATE WATER RESOURCES CONTROL BOARD'S PETITIONS TO VACATE RESPONDENT FERC'S ORDERS

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I. INTEREST OF AMICI CURIAE

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, the States of Washington, Connecticut, Maine, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Vermont, the District of Columbia, and the Commonwealths of Massachusetts and Virginia submit this brief in support of Petitioner, California State Water Resources Control Board's (State Board) petitions to vacate Respondent Federal Energy Regulatory Commission's (FERC) Orders, which found that the State Board waived its authority under Section 401 of the Clean Water Act to issue water quality certifications for four hydroelectric projects along California rivers.

Like California through the State Board, the Amici States exercise authority under Section 401 of the Clean Water Act, 33 U.S.C. §§ 1251–1387, to issue or deny water quality certifications for projects that may result in a discharge and require a federal license or permit. *See generally* 33 U.S.C. § 1341. Amici States implement Section 401 in a manner that is consistent with the Clean Water Act, their state laws, and proprietary and statutory interests in water quality within their states. Accordingly, Amici States have substantial interests in the proper application of the state waiver provision of Section 401 as presented in these consolidated petitions for the Court's review.

II. INTRODUCTION

"The states remain, under the Clean Water Act, the 'prime bulwark in the effort to abate water pollution,' and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law." *Keating v. Fed. Energy Regul. Comm'n*, 927 F.2d 616, 622 (D.C. Cir. 1991) (quoting *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983)).

The primacy of states' regulatory authority over their waterways is evident in Section 401 of the Clean Water Act. Under this provision, states determine whether a project seeking a federal license or permit complies with state water quality standards and other applicable state laws. These projects, such as hydropower dams and natural gas pipelines, can be complex and have potentially enormous water quality impacts. In order for states to make informed and reasoned decisions, they must be able to undertake a complete assessment of the project's water quality impacts and mitigation proposals. This state authority is particularly important for natural gas pipeline and hydropower projects that are otherwise largely regulated by federal law. *See generally, e.g., California v. Fed. Energy Regul. Comm'n*, 495 U.S. 490, 506 (1990). Because this process can reasonably extend beyond one year for complex projects, an applicant's

withdrawal and resubmission of its request for certification is a practical procedure that is permissible under the plain language of the Clean Water Act, consistent with the legislative intent of the Act, and furthers the principles of judicial economy and the public interest.

Accordingly, applying *de novo* review of FERC's interpretation of Section 401's waiver provision, this Court should hold that FERC erred in finding the State Board waived its Section 401 certification authority. *See Ala. Rivers All. v. Fed. Energy Regul. Comm'n*, 325 F.3d 290, 296–97 (D.C. Cir. 2003) (holding FERC's interpretation of Section 401 is not entitled to judicial deference because FERC is not charged with administering the statute). Amici States respectfully request this Court to vacate FERC's license orders.

III. ARGUMENT

A. FERC's Waiver Findings Undermine States' Authority to Regulate Water Quality Within their Borders

The Clean Water Act plainly states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources.

33 U.S.C. § 1251(b).

Throughout the Act, Congress repeatedly underscores the states' authority to regulate water quality within their borders and impose additional protections that go beyond the federal requirements. *See, e.g.,* 33 U.S.C. § 1313 (states determine water quality level requirements so long as they meet baseline federal standards); *id.* § 1370 (states may limit pollutant discharge or require control or abatement of pollution so long as the requirements are at least as stringent as the Act).

Section 401 also recognizes the primacy of state regulation over water quality by requiring applicants for a federal license or permit for activity that may result in a discharge into navigable waters to obtain state certification that any such discharge complies with the Clean Water Act and other requirements of state law. *See id.* § 1341(a)(1); *see also City of Fredericksburg, Va. v. Fed. Energy Regul. Comm'n*, 876 F.2d 1109, 1112 (4th Cir. 1989) (holding FERC's license for a hydroelectric dam project was invalid because the applicant failed to obtain Section 401 certification); *Keating*, 927 F.2d at 622 ("Through [Section 401], Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."). Through this certification process, states may impose effluent and

other limitations and requirements that become binding conditions of the federal license or permit. 33 U.S.C. § 1341(d).

Courts have long recognized states' critical role in regulating water quality. *See, e.g., PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 707 (1994) ("States are responsible for enforcing water quality standards on intrastate waters."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 646 (4th Cir. 2018) (holding federal agency may not replace or alter state water quality conditions attached to a Section 401 certification); *Keating*, 927 F.2d at 622. And, the legislative history for the Clean Water Act further confirms Congress's intentional preservation of states' authority to regulate water quality. *See, e.g., Sierra Club*, 909 F.3d at 647 ("Legislative history further emphasizes the central role Congress intended for the States to play under the regulatory scheme laid out in the Act.").

Accordingly, a determination that weakens states' ability to regulate water quality within their borders is contrary to the plain language and legislative intent of the Clean Water Act, as well as the case law analyzing both. Although the Act prescribes how a state may waive its Section 401 authority, to effectuate the statutory plain language and the Congressional intent to preserve states' fundamental rights to protect water quality in their states, this provision must be

construed in favor of non-waiver. *See* 33 U.S.C. § 1341(a)(1). In this case, FERC's findings of waiver undermine the fundamental purposes of the Clean Water Act and, for the reasons described herein, are contrary to law.

B. The Clean Water Act Permits Withdrawal and Resubmission of Section 401 Certification Applications Without Waiving State Authority

FERC's waiver determinations are contrary to both the plain language and legislative history of Section 401's waiver provision. These authorities make plain that Section 401 neither bars an applicant from voluntarily withdrawing and resubmitting a request for Section 401 certification nor justifies a waiver determination when that practice occurs.

First, the plain language of Section 401 provides that a state waives its authority to issue, condition, or deny a Section 401 certification *only* if the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). The one-year timeframe runs only from the receipt of the applicant's request. The statute imposes no further restrictions on the timeframe of a state's review of a Section 401 application and no statutory language prohibits an applicant from withdrawing its request for certification at any time, for any reason. An applicant may withdraw a request because it has decided not

to pursue the applicable federal permit, because it wishes to submit additional information or proposals for the state to review, or, as here, when information required for an application to be deemed complete cannot be obtained in time to avoid a state's denial of certification before the one-year period. FERC's findings of waiver when the State Board neither failed nor refused to act on the Applicants' requests for certification thus are contrary to the text of Section 401.

Second, FERC's waiver determinations run counter to Section 401's legislative history. The current Section 401 was included in a 1970 amendment to the Federal Water Pollution Control Act as Section 21(b).[1] As originally drafted, state water quality certifications were not confined to a particular timeframe.[2] In the reconciliation process, Congress added the waiver provision only in response to concerns that a state could potentially block federally approved projects by simply refusing to act on an application for a water quality certification.[3] Thus, the proposed timeline and waiver provision "guard[ed] against a situation where the [certifying state] . . . simply sits on its hands and does nothing."[4] When the Clean Water Act was reorganized and amended in

[1] *See* Pub. L. No. 91-224, 84 Stat. 91, 108 (1970).
[2] H.R. Rep. No. 91-127, at 42–43 (1969).
[3] 91 Cong. Rec. 9264–65 (Apr. 16, 1969) (House debate on H.R. 4148).
[4] *Id*. at 9265 (statement of Congressman Chester Holifield).

1972, Congress carried this language forward essentially unaltered into what is now Section 401.[5] When it did so, and as noted in the House Report, Congress' purpose remained focused on guarding only against "sheer inactivity" by the states.[6]

In other words, Congress never intended to impede a project proponent's ability to voluntarily withdraw its application to avoid a Section 401 certification denial. And, in these cases, as described below, there is no assertion that the State Board engaged in "sheer inactivity" or in an effort to indefinitely delay relicensing of the projects. As such, FERC's waiver decisions contravene both the plain language of the Act and Congressional intent.

C. *Hoopa Valley Tribe* Is a Flawed, Narrow, and Fact-Specific Decision that Is Not Applicable to this Case

FERC relies heavily on the D.C. Circuit's ruling in *Hoopa Valley Tribe v. Fed. Energy Regul. Comm'n*, 913 F.3d 1099 (D.C. Cir. 2019), to conclude that the State Board waived its Section 401 certification authority with regard to the consolidated cases at issue here. For the reasons stated below and in the State Board's Opening Brief, *Hoopa Valley* is both factually inapposite and based on a mistaken reading of Section 401.

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[5] Pub. L. No. 92-500, 86 Stat. 816, 877–78 (1972).
[6] H.R. Rep. No. 92-911, at 122 (1972).

Amici States therefore urge this Court to follow Fourth Circuit and Second Circuit precedent that Section 401 does not require a state to make a certification decision within one year of an applicant's first request if that request is incomplete or withdrawn.[7] As the Fourth Circuit recently concluded: "[T]he language of § 401 makes the one-year review period specific to each application request – the state agency must act on an application within a year of the filing of that application." *N.C. Dep't of Env't. Quality v. Fed. Energy Regul. Comm'n*, 3 F.4th 655, 667 (4th Cir. July 2, 2021) (*NCDEQ*) (quoting *Hoopa Valley*, 913 F.3d at 1104 ("Implicit in the statute's reference 'to act on a *request* for certification,' the provision applies to a specific request. This text cannot be reasonably interpreted to mean that the period of review for one request affects that of any other request.")); *see also AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009) (upholding an interpretation of section 401 as requiring a complete application before the one-year waiver period begins); *infra* Section D for discussion regarding *New York State Department of Env't*

[7] The Second Circuit's recent decision in *New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*, 991 F.3d 439 (2nd Cir. 2021), is not in conflict. That case involved a formal agreement between the parties to artificially extend the review period by modifying the date New York received the application by 36 days. *Id*. at 444. No such agreement exists here.

Conservation v. Federal Energy Regulation Commission, 884 F.3d 450, 456 (2d Cir. 2018) (explaining that states may request the applicant to withdraw and resubmit an application deemed incomplete).

The Fourth Circuit's rejection of FERC's over-application of *Hoopa Valley* evinces what is evident on the face of the decision: *Hoopa Valley* is a "very narrow" decision that cannot be stretched to apply beyond its "fairly egregious" set of facts. *NCDEQ*, 3 F.4th at 669. In *Hoopa Valley*, California and Oregon had Section 401 certification authority for the relicensing and decommissioning of a series of dams along the Klamath River. *See Hoopa Valley*, 913 F.3d at 1101–02. In 2004, the project applicant filed its application with FERC to relicense certain dams and decommission others. The project applicant first filed its requests for Section 401 certification with California and Oregon in 2006. Four years later, the states entered into a settlement agreement with the project applicant and other interested parties, which preconditioned decommissioning on a number of future events—including securing federal funds. To accommodate the undefined timeline of these events, the settlement agreement included a specific term that the project applicant "shall withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the [Clean Water Act] during the

Interim Period." *See Hoopa Valley*, 913 F.3d at 1102. Beginning in 2012, Hoopa Valley Tribe, which was not party to the settlement agreement but whose reservation is downstream from the project, began petitioning for a declaration that Oregon and California had waived their Section 401 authority. Those efforts culminated in a petition to the D.C. Circuit Court of Appeals.

The D.C. Circuit agreed with the Tribe and held that California and Oregon waived their Section 401 certification authority for the project. *Id.* at 1105. The court specifically highlighted, however, that its decision was deliberately narrow and based on the facts in the *Hoopa Valley* record:

> The record does not indicate that [the applicant] withdrew its request and submitted a wholly new one in its place, and therefore, *we decline to resolve the legitimacy of such an arrangement*. *We likewise need not determine how different a request must be to constitute a "new request" such that it restarts the one-year clock.*

Hoopa Valley, 913 F.3d at 1104 (emphasis added). The D.C. Circuit made clear that its decision rests on the following facts: (1) an applicant entered a written agreement with reviewing states to delay certification; and (2) the applicant's "coordinated withdrawal-and-resubmission scheme" of identical documents occurred for more than a decade. *Id.* at 1103. These core facts are not present in the cases before this Court, nor in the vast majority of instances (if any) where Amici States exercise their Section 401 certification authority.

Specifically, here FERC misapplied *Hoopa Valley* by concluding that state's authority under Section 401 should be deemed waived in the absence of a "formal agreement" with the applicant. In fact, the D.C. Circuit reasoned that it was California and Oregon's "deliberate and *contractual* idleness" that amounted to a failure or refusal to act under Section 401. *Hoopa Valley*, 913 F.3d at 1104 (emphasis added). *See NCDEQ*, 3 F.4th at 669. The record here reflects that the State Board did not enter into *any* agreements—contractual or otherwise—with the Applicants' to withdraw and resubmit their application. Accordingly, *Hoopa Valley* does not dictate concluding that the State Board waived its Section 401 certification authority.

FERC also misapplied *Hoopa Valley* by concluding that the Applicants' withdrawals and resubmissions of their requests for certification did not restart the one-year waiver period because the Applicants' resubmitted requests did not convey additional information to the State Board. In *Hoopa Valley,* it was critical that the project applicant's request had been "complete and ready for review for more than a decade." *Hoopa Valley*, 913 F.3d at 1105. The court characterized the specific factual scenario as "exploit[ing] the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time." *Id.* Nothing

in the record here supports a contention that the State Board or the Applicants were "exploiting" the certification process over an extended period of time.

FERC's rationale neglects the facts that:

(1) at the time of the first (and in one case the second) withdrawal and resubmittal, FERC's Environmental Assessment was not complete (*see, e.g.,* 1-ER-00042; 2-ER-00199 to -00203; 5-ER-00668 to -00721);

(2) the Applicants' legally required environmental analysis under the California Environmental Quality Act (CEQA) was not complete by the time of subsequent withdrawals and resubmittals (*see*, *e.g.*, 8-ER-01291 to -01292);

(3) the State Board, at regular intervals submitted updates to FERC on the status of the requests (*see*, *e.g.*, 7-ER-01098), informed FERC and Applicants of the need for CEQA documentation and further water quality information (*see*, *e.g.*, 4-ER-00397 to -00399; 8-ER-01259 to -01265), provided comments and preliminary certification conditions on FERC's initial notices and draft environmental review documents (*see* 2-ER-00204 to -00208), in one instance, issued its own independent study request (*see* 7-ER-01080); and

(4) in at least one case, even after FERC completed its environmental review, the National Marine Fisheries Service found the review inadequately analyzed impacts to fish and ordered an additional biological assessment under

the Endangered Species Act. (*see* 2- ER-00187 to -00188). That consultation is still not complete. *See* Dkt. 35-1 at 53.

As such, unlike in *Hoopa Valley*, the Applicants' resubmitted requests did, in fact, rely on additional, new information that was not available in the initial requests, and was developing as the required environmental review progressed. Therefore, *Hoopa Valley* is distinguishable and FERC's finding of waiver is erroneous.

D. FERC's Waiver Decisions Unlawfully Expand the Narrow Waiver Criteria Established by Congress

Further, FERC's waiver decisions, and their focus on *Hoopa Valley*, conflict with analogous authority from the Second and Fourth Circuit as discussed above, both of which recognized the plain language and legislative history of the Clean Water Act in determining that state requests to withdraw and resubmit incomplete applications do not constitute waiver. Specifically, in *New York State Department of Environmental Conservation* ("Millennium Pipeline decision"), the Second Circuit explained that if a state believes an applicant has submitted insufficient information, it could "request that the applicant withdraw and resubmit the application." *N.Y. State Dep't of Env't Conservation*, 884 F.3d at 456 (citing *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Env't Conservation*, 868 F.3d 87, 94 (2d Cir. 2017), *cert. denied*

138 S. Ct. 1697 (2018)). According to the court, the withdrawal and resubmittal procedure "restart[s] the one-year review period" and is a permissible alternative to denying certification for lack of necessary information. *Id.* at n.35. Though the court held New York waived its authority on other grounds, it cited with approval the withdrawal and resubmittal process as a way to ensure that a state can avoid waiver and work with the applicant to refile in accordance with its requirements in cases where the applicant submits insufficient information, and even in cases where the waiver period starts before a complete application has been received. *Id*. at 456.

Moreover, just last month the Fourth Circuit rebuked FERC's over-reliance on *Hoopa Valley* in overturning a similar FERC waiver decision. In that case, *NCDEQ*, 3 F.4th 655, FERC determined that North Carolina waived Section 401 certification for a hydropower project on the Haw River based on facts analogous to those presented here. *Id*. at 662–63. Specifically, the dam's operator submitted its request for 401 certification in March 2017; but, because FERC had not completed the project's environmental review, and unresolved issues remained surrounding the project's water quality monitoring plan, the applicant withdrew and re-submitted its application multiple times as these issues were resolved. *Id*. North Carolina ultimately issued its 401 certification

for the project in September 2019 and, on the same day, FERC granted the dam operator a 40-year license for the project. *NCDEQ*, 3 F.4th at 663. In doing so, however, FERC excluded North Carolina's Section 401 conditions based on FERC's determination that North Carolina waived its authority by not issuing a certification within one year from the original March 2017 application date. *Id*.

Upon review, the Fourth Circuit reversed FERC's waiver determination. *Id.* at 671. While the court found that FERC's decision was unsupported by substantial evidence, the court also included a lengthy discussion rejecting FERC's broad application of *Hoopa Valley* and clarifying the scope of its waiver authority under Section 401. *Id.* at 667–71.

As noted above, the court stated the obvious: *Hoopa Valley* is a narrow decision flowing from "a fairly egregious set of facts" involving a written agreement obligating the state agencies "to *take no action at all* on the applicant's § 401 certification request" for over a decade. *Id.* at 669. Unlike the facts in *Hoopa Valley*, and similar to the facts here, the court found "no idleness" on North Carolina's part; instead, in the first year following receipt of the application, North Carolina "met and corresponded frequently" with the project proponent, reviewed relevant submissions and determined a water quality monitoring plan would be required, "gave . . . advice about what should be

included" in the plan, and reviewed it when finally submitted. *NCDEQ*, 3 F.4th at 669. In the years that followed, North Carolina "continued to correspond and meet" with the project proponent and "help[ed] in the development of the water-quality monitoring plan." *Id*. Thus, the court found these actions to bear "little relation" to the situation in *Hoopa Valley*. *Id*.

In fact, in considering the text and legislative history associated with Section 401 and the significant emphasis Congress placed on State autonomy under the Clean Water Act, the court questioned whether Section 401 contemplates that the state must take *final* agency action within one year of a certification request. *NCDEQ*, 3 F.4th at 670. The court noted that, while Section 401 requires a state to "certify or deny" compliance, the waiver portion of the statute uses a different verb when stating that a state waives Section 401 authority only if it "fails or refuses to *act*" on a certification request within one year. *Id.* at 669–70. The court indicated that significant and meaningful action may be all that is required to avoid waiver. *Id.* at 670. While Amici States believe that FERC's waivers in this case can be rejected without reaching this question, the Fourth Circuit's analysis is a powerful reminder that Congress did not intend State authority under Section 401 to be so blithely set aside.

In sum, no circuit—including the D.C. Circuit in *Hoopa Valley*—has adopted the rigid application of Section 401's waiver provision advanced by FERC here. *See NCDEQ*, 3 F.4th at 670, n.5. Instead, the language, history, and purpose of Section 401 establish that waiver is proper only where an agency fails to act on the request that is actually pending before it. *Id*. at 670. Because the State Board acted within the timeframe established under Section 401, this Court should reject FERC's unlawful expansion of the narrow waiver criteria established by Congress.[8]

E. Withdrawal and Resubmission of Section 401 Certification Applications Without Waiving State Authority Is Effective and Efficient.

Allowing project proponents to withdraw and resubmit applications until necessary information is available, or when applicants submit new proposals or information for the state to consider, is not only lawful, it is often a useful and productive practice, especially for complex projects such as those involving

[8] In addition, Amici States support the State Board's argument that several equitable doctrines preclude findings of waiver in these consolidated cases. *See* State Board's Opening Br. at 76–87. Given FERC's longstanding interpretation that withdrawal and resubmittal starts a new one-year period, and the applicants' failure to complete environmental analyses that they represented they would complete, and that were required by state law (effectively blocking the State Board from being able to determine whether a project will comply with water quality standards and requirements), FERC's waiver determinations are inequitable and conflict with the purpose of Section 401.

hydropower and natural gas pipelines. Because of the level of environmental review associated with these projects, state review frequently requires analysis of a complex suite of potential impacts, including: the project's impact on water temperature; flow for habitat, aesthetics, and recreation; water chemistry (including pH), dissolved oxygen, turbidity, and gas supersaturation; and impacts to existing and designated uses of the water body. It often necessarily takes more than one year to assemble the suite of information required to assess these impacts.

For example, the technical studies necessary to evaluate dam impacts often require assessment of a full year-long water cycle. As such, these studies—and others—frequently extend well beyond a year. If such information is not available within Section 401's one-year timeframe, states often cannot evaluate and issue certifications due to inadequate information on impacts. As a result, states, project applicants, and, until recently, the U.S. Environmental Protection Agency, have long recognized the advantage of allowing the project applicant to withdraw and resubmit its application upon completion of the technical studies to enable states to base their certification decisions on the fully evaluated impacts of the project. *See Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes*, Env't Protection Agency,

Office of Wetlands, Oceans, and Watersheds, at 13 (April 2010 Interim) (withdrawn June 7, 2019 pursuant to "Promoting Energy Infrastructure and Economic Growth," Executive Order No. 13868, 84 Fed. Reg. 15,495 (Apr. 10, 2019)).[9]

Moreover, states may also need more than one year to obtain FERC's environmental analysis as required by the National Environmental Policy Act (NEPA). *See* 42 U.S.C. §§ 4321–47. Washington State and other Amici States typically utilize FERC's environmental analyses to inform Section 401 certification decisions. Indeed, "NEPA documents frequently include valuable and objective scientific analyses pertaining to water quality standards, especially information on hydropower project effects on uses designated by water quality standards." *See, e.g., Water Quality Certifications for Existing Hydropower Dams*, Washington State Dep't. of Ecology Publication No. 04-10-022, at 16 (Mar. 2005).[10] States also frequently rely on FERC's NEPA documents to satisfy state environmental policy acts, ultimately eliminating the need for states to perform expensive and unnecessarily duplicative efforts. Completion of FERC's

[9] *Available at* https://www.nrc.gov/docs/ML1121/ML112160635.pdf.
[10] *Available at* https://fortress.wa.gov/ecy/publications/SummaryPages/0410022.html.

assessment is also critical because the analysis may change the scope and configuration of the project.

Requiring states to act on incomplete or changing applications also frustrates public interest because it places states in the untenable position of making Section 401 certification decisions on an incomplete record. For a certification request to be meaningful, states need sufficient information to determine whether a project will comply with water quality standards and requirements. Because states do not control FERC's relicensing schedule, states required to approve or deny requests within one year—regardless of whether a complete or sufficient certification request has been received—may not be able to conclude that a project would comply with state standards. Similarly, forcing states to act within a year of an applicant's original application regardless of the applicant's new or revised materials puts states in an untenable position. As such, if an applicant cannot withdraw and resubmit its certification request and restart the one-year certification timeframe, states may be forced to simply deny the requests because they cannot determine that the projects will comply with applicable state laws and water quality standards. The applicant may then seek judicial review of the denial, creating further administrative burdens and uncertainties for the state and applicants alike. Such an outcome fails to serve

the public interest and will undermine the purpose of Section 401 by leading to additional delays and protracted litigation.

IV. CONCLUSION

For the foregoing reasons, Amici States respectfully request the Court to vacate FERC's waiver determinations and remand FERC's Orders to incorporate the State Board's Section 401 Certifications for the Applicants' projects.

RESPECTFULLY SUBMITTED this 13th day of August, 2021.

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I hereby certify that on August 13, 2021, I cause the foregoing document to be filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Electronic Filing System, which will automatically serve electronic copies on all counsel of record.

s/ Gabrielle Gurian
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